

THE FACES OF JAPANESE LABOR RELATIONS IN JAPAN AND THE U.S. AND THE EMERGING LEGAL ISSUES UNDER U.S. LABOR LAWS

Ronald C. Brown*

I. INTRODUCTION

A. *Japanese Developments in Labor Relations Show Many Faces*

Though it has been said the face of a Japanese negotiator can be "inscrutable," the face or faces of Japanese labor relations in Japan and the new Japanese-style labor relations in the United States are more easily described. As new information brings the subject into closer focus, what historically has been put forward in sometimes monolithic form as the "traditions" of Japanese labor relations, has been more recently understood to contain many "myths" and actually has several "faces." But myth or reality, the so-called "traditions" of Japanese labor relations are being put into practice in the United States in adapted form by Japanese investors and are being adopted by U.S. companies as well. This Japanese-style labor relations is in effect — the "new labor relations" in the United States.¹

The resulting employment practices and their legality have significant implications for U.S. labor policies affecting American workers, unions, and companies as well as the financial viability of the companies established by the Japanese investor. To understand the impact this "new labor relations" is having in the United States, some insights into the several faces of Japanese labor relations as it relates to unionism and treatment of employees may be useful.

Though some may argue there are "bright" sides and "dark" sides to the "new labor relations," certainly there are at least policy issues raised, that should be addressed by those affected, and perhaps by Congress, as well as by participants in a forum such as this..

* Professor of Law, University of Hawaii School of Law.

1. See Brown, *Labor Law Issues Facing Multinational and Japanese Companies Operating in the United States Using Japanese-Style Labor Relations: Agenda Items Under the "New Labor Relations,"* 8 U. HAW. L. REV. 261 (1986) [hereinafter *The New Labor Relations*].

B. Forces and Effects of Increased Japanese Direct Investment in the United States

By way of background, it is useful to mention both the forces and the effects on U.S. interests of increased U.S.-foreign business dealings. Trade and investment between and within the United States and foreign businesses, including with Japan, arguably have had certain effects in the United States:

- politically (pressures for protectionist legislation)
- economically (loss of jobs and industries)
- socially (incidents or allegations of sexism or racism by Japanese companies and also by American companies against Asian-Americans)
- legally (as our laws are called upon to address, and sometimes redress these developments)

There are two aspects of foreign business involvement in and with the United States: *foreign trade imports* and *foreign direct investment*. The balance of trade figures show the United States has a trade deficit with most of its trading partners, including Japan, which was a highly visible \$60 billion in 1987.²

These trade deficits have also been linked with the loss of jobs in the United States, as cheaper foreign products displace labor and industries, such as in the shoe industry in the Northeast.³ Why does this apparent failure of American competitiveness exist and who or what is the cause? Blame is variously fixed on high labor costs, rigid union standards, archaic labor laws, outdated manufacturing plants, and outdated management techniques. Of course, the cause can be attributed to all of the above, plus allegations of unfair trading practices by the Japanese.

The point is, however, with this high trade deficit, comes certain political and social realities in the United States. Feelings of resentment against the Japanese, whether justified or not, are observable in the United States. Although the issues debated usually have centered around developing fairer trade relations with Japan and the appropriateness of invoking the political response of protectionist legislation, related and somewhat darker manifestations are also occasionally observable in the form of alleged incidents of anti-unionism, racism, and sexism allegedly practiced by Japanese and U.S. companies in the United States against American and

2. See also Powell, Martin, Lewis, Turque & Raine, *Where the Jobs Are*, NEWSWEEK, Feb. 2, 1987, at 42 [hereinafter *Where the Jobs Are*].

3. See *id.*

Asian-American citizens.

The other facet of American involvement in and with the United States is foreign direct investment in the United States, including that from Japan, which is also dramatically increasing at the same time as the foreign trade deficit.⁴ Why? One reason is the surplus of money in Japan as a result of its huge trade surplus. It is reported that of the ten largest banks in the world, seven are Japanese.⁵

Also, perhaps in response to world and United States threats to erect trade barriers, Japan has been moving much of its considerable foreign direct investment into the United States. In recent years, nearly one-third of Japan's \$10 billion investment in overseas manufacturing went to the U.S. and from 1975 the growth of Japan's direct investment in the United States rose from almost nothing to an astounding \$27 billion in 1986.⁶ This U.S. manufacturing capability provides Japan with direct access to the U.S. markets without concern for trade barriers and, as is true for other multinationals, it permits exports from the U.S.-based plants not only to Japan, but to Europe and world markets that might otherwise have limitations on these goods if they were shipped from Japan. Direct investment in the United States is also good public relations in that it assists U.S. efforts to reduce its trade deficit and creates jobs in the United States.

Other practical reasons causing Japan to invest overseas have all converged in recent years and prompted its dramatic increase in foreign direct investment.⁷ These include slow domestic demand in Japan, the changing value of the yen, and competition from countries with lower labor costs. The Japanese response to these events has been to try to protect their domestic markets while at the same time expand their overseas targets, not through direct trade, but indirectly through direct investment in the United States.

Recent figures show that there are over 500 assembly and manufacturing plants owned by the Japanese in the United States, employing some 250,000 American workers.⁸ If reports are accurate, the size of Japan's direct investment in the United States in

4. U.S. Commerce Bureau of Statistics for latest figures.

5. *Where the Jobs Are*, *supra* note 2, at 43.

6. *Id.*

7. *Id.* at 44. See also Y. Kuwahara, *Foreign Investment and Labor-Problems Involved in Japan's Direct Investment in the United States* (Aug. 1985), cited in *The New Labor Relations*, *supra* note 1, at 263.

8. *Where the Jobs Are*, *supra* note 2, at 42.

future years will continue to dramatically increase and the number of Americans employed by Japanese-owned companies will swell to 840,000 by the 1990's.⁹

With these continuing waves of Japanese investment in the United States comes the Japanese-style labor relations. And if it continues to work, U.S. companies will also seek to adopt usable Japanese-style employment practices. What impact this will have and is having on U.S. workers, unions, and companies, as well as on the Japanese companies in the United States under existing labor laws, is the subject of my remarks. Whether and how well U.S. labor laws, largely designed in the 1940's and 1960's, will be able to adapt and appropriately accommodate the pressures of the "new labor relations" introduced by the Japanese investors, is a story that is just beginning.

In this paper, I will touch on two areas: first a discussion of the Japanese-style employment practices in Japan and the essential elements being used in the United States; and second, a discussion of the legal and policy issues they raise under the U.S. labor laws.

II. COMPARATIVE UNITED STATES - JAPAN LABOR RELATIONS PRACTICES

A. *In Japan: Traditions and Myths*

1. *Background and Traditions*

It is interesting to note that in Japan, over the years, there have been very few minorities and relatively few foreigners living or working.¹⁰ In such a homogeneous society, it was perhaps expectable that historic traditions of a Confucian society were easily carried forward with widespread effect and acceptance throughout Japanese society. One deeply held principle — the Confucian concept of *wa* — spiritual ascendance through harmony and common effort — has by analogy been applied to the working family of a corporate enterprise.¹¹

9. *Id.* In 1985, 7.3 percent of Americans employed by foreign firms were employed by a Japanese owned company. Foreign Direct Investment In the United States, U.S. Department of Commerce, Bureau of Economic Analysis 1981-1986.

10. E. REISCHAUER, *THE JAPANESE*.

11. See Karsh, *Managerial Ideology and Workers Co-Optation: The U.S. and Japan, Viability Of The Japanese Model Of Industrial Relations* 81, 87-88 Int'l Indus. Relations Ass'n 81, 87-88 (1983); see also, Shirai, *A Supplement: Characteristics of Japanese Management and Their Personnel Policies*, CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 369

Japanese notions of hierarchical familism and collectivism based on the *amae* or family relationship (embodying both paternalism and dependency), place high value on harmony, cooperation, consensus, and loyalty. It is not unexpected then that we see these concepts utilized in Japanese personnel and labor relations practices.¹²

The tradition of collectivism, which takes place within a "family" structure, can be observed to be a situation where *group effort* is sought over individual accomplishment, *harmony* is sought over conflict, and *cooperation and consensus* are often used as means to achieve a collective goal.¹³ These are reflected in personnel practices which stereotypically try to "humanize" employment relations by treating employees as family — as part of the team. In times of manpower cutback many employees are viewed therefore as "renewable" rather than "replaceable" assets; and retraining, rather than discharge would be the preferred course of action.

The two striking features of Japanese labor relations are its use of cooperation and its management style to achieve its business goals. The traditional face of the Japanese employer as a paternalistic, parent figure in the relationship with its employees, is one which is taken seriously in its approach to management of the business and the workers. And, in return, the employer expects full effort by the employees in terms of cooperation and loyalty.¹⁴

Cooperation in Japanese labor relations is probably the dominant stereotypical tradition that Westerners notice. It manifests itself in a variety of institutionalized employment practices including a de-emphasis on management-worker distinctions; and, it is not uncommon for many levels of supervisors to work side by side and to socialize outside the workplace. In fact all but the top level supervisors will usually be represented by the same union.¹⁵ It also manifests itself in requirements of loyalty, not only in the negative sense of refraining from disloyal acts or statements, but also in the affirmative sense of actively engaging in helpful cooperative activities such as *kaizen*, where quotas of daily and weekly suggestions for improvement of company operations must be made.¹⁶

(1983) [hereinafter Shirai].

12. See T. HANAMI, *LABOR RELATIONS IN JAPAN TODAY* 48-49, 55 (1979).

13. *Id.*; see also Shirai, *supra* note 11.

14. See E. VOGEL, *JAPAN AS NUMBER ONE* 146-152 (1979).

15. See Koshiro, *Development of Collective Bargaining in Postwar Japan*, *CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN* 205 (1983).

16. See, M. IMAI, *KAIZEN: THE KEY TO JAPAN'S COMPETITIVE SUCCESS* (1986).

Job flexibility is a normal requirement when hiring someone in Japan, rather than giving them a specific and narrow job description. This permits greater managerial flexibility and avoids wasteful and duplicative use of labor. This somewhat "holistic" approach to working for the company provides a vivid contrast to the traditional U.S. approach on this point where job descriptions have been viewed as useful in preserving job skills.

Joint consultation through the use of manager-worker committees provides a forum where cooperation over a wide range of subjects — including bargainable subjects under U.S. law — will produce a unified approach to common problems. Often, traditional managers and workers share decision-making responsibilities.

Unions often play a dominant part in these cooperative efforts and their dual role of representing worker interests as well as promoting the common goal of increased productivity would in the "eyes" of U.S. unions make their independence somewhat suspect. In fact, the unions in Japan maintain a close working relationship with the management of their enterprise.¹⁷

The principle of cooperation also is seen in the methods by which Japanese workers resolve industrial disputes. Conflict avoidance mechanisms and the goal of reaching harmony on issues is said to guide the disagreeing parties toward resolution. It is traditional in Japan for industrial action to be taken in demonstrative form without resort to overt conflict; and, harassment or embarrassment is used, rather than attempts to damage the "family" business from which their incomes are derived. Therefore, ribbon struggles, the use of arm-bands, or as a last resort, strikes of very short duration might be used to place pressure for settlement.¹⁸ Questions are sometimes raised whether the 1-12 ratio of lost work days due to labor strife in Japan, compared with the United States, is because Japanese unions are smarter — or weaker.

In addition to cooperation, a second dominant feature of Japanese labor relations is its *management style* in using its workforce to achieve business goals. It has been said that the management philosophies and industrial relations policies of Japanese employers generally contain five underlying principles:

17. See, Shirai, *A Theory of Enterprise Unionism*, CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 117 (1983).

18. See T. HANAMI, *supra* note 12, at 113-124; see also W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 13 (1984).

First, their primary concern is the continued existence and further development of their corporation. Second, they regard all company employees, including themselves, as members of the same corporate community. Third, they take an egalitarian view of income distribution between labor and management within the company. Fourth, they are crucially concerned with maintaining stability and peace in the company's industrial relations. In other words, they strive to avoid industrial disputes and strikes, often at any cost. Fifth, they tend to reject the intervention of outside labor groups in any negotiations over internal labor problems, an attitude that might be described as exclusionist.¹⁹

These principles pervade the Japanese personnel management system, and although there are many similarities with the American system, one of the most apropos of the many comparisons made of American and Japanese management approaches is that "Japanese and American management is 95 percent the same and differs in all important respects."²⁰

Lastly, using group *consensus* as a management style in decision-making is said to have the advantage of putting the full group behind their decision (even though some argue this requires too much time before decisions and also cynically note these discussions are often orchestrated by higher management).²¹ This contrasts, however, with a traditional U.S. management-style where a "command from management" may require much time after the decisions in order for the group to implement "management's" decision.

2. *The Three Pillars of Japanese Industrial Relations: Realities and Myths*

The Japanese have incorporated the traditional attributes of their personnel management relations, such as a cooperation and working for the common good of the enterprise, into their more recent industrial relations policies. These policies, the so-called "three-pillars" of Japanese industrial relations, are lifetime or permanent employment (*shushin koyo*), wage-seniority policies (*nenko*), and enterprise unionism.²²

Loyalty and cooperation are encouraged by the first two poli-

19. Shirai, *supra* note 11, at 374-375.

20. R. PASCALE & A. ATHOS, *THE ART OF JAPANESE MANAGEMENT* 85 (1981).

21. This is described in Rohlen, *The Contemporary Work Group*, *MODERN JAPANESE ORGANIZATION AND DECISION-MAKING* 185, 191-195 (1975).

22. See T. HANAMI, *supra* note 12, at 88-112.

cies because of the job security provided by the policy of permanent employment and by the assurance given to the more senior workers under the wage-seniority policy that even though their wages will be lower initially, the less senior workers generally will not pass them in wages or rank.²³ This protection of a worker's "status" is further supported by a common, related policy of "promoting from within" the company, rather than through a lateral hiring. Over the years there has been low employee mobility as employers seemed reluctant to hire mobile employees, especially at a lateral level, perhaps because their loyalty is suspect.

The third pillar, enterprise unionism, is a system where employees are organized on a plant-wide basis, rather than on an industrial or craft basis.²⁴ Also, Japanese unions, while having vertical affiliations, differ from those in the U.S. in that the relationship does not usually provide "international union muscle" at the local enterprise level, but rather performs other functions. The local enterprise union has autonomy over its decisions and rules. Inasmuch as the enterprise union in Japan has the dual function of protecting workers and productivity, it finds itself in a position to be quite responsive to the local needs of the plant.

The face of labor relations portrayed by Japanese employers' use of these three pillars is marred, however, by the fact that these practices are minority practices riddled with exceptions. In fact, lifetime employment is provided to fewer than twenty-five percent of Japanese workers; pure wage-seniority is available to less than one percent; and enterprise unionism is normally present only in the larger companies.²⁵

In fact, studies show Japanese employees work long work weeks, are noted for not taking their vacation time, and the Japanese employers have a history of under-employing women and minorities, and making great use of temporary workers — the so-called shock absorbers for business fluctuations — who do not qualify for the same benefits as permanent employees.²⁶

Critics of the Japanese system of labor relations contend that in addition to the statistical absence of the three pillars of indus-

23. See Koike, *Internal Labor Markets: Workers in Large Firms*, in Shirai, *supra* note 11, at 30-60.

24. See *A Theory of Enterprise Unionism*, in Shirai, *supra* note 17 at, 205-257.

25. See, e.g., Modic, *Myths About Japanese Management*, *INDUSTRY WEEK*, Oct. 5, 1987, at 49-53; see also W. GOULD, *supra* note 18, at 104; R. COLE, *JAPANESE BLUE COLLAR: THE CHOOSING TRADITION* 81-82 (1971); T. HANAMI, *supra* note 12, at 31-35.

26. See T. HANAMI, *supra* note 12, at 26.

trial relations in Japan, there are other defects. For example, life-time employment may keep incompetent but loyal employees on the payroll, but if they are not producing, this cuts into efficiency. The policy of wage-seniority is a method of deferred compensation that permits an employer to employ young workers very inexpensively and arguably inhibits their mobility as every year goes by. The third pillar, enterprise unionism, is viewed by some as too weak a protection for workers. They argue that the union's loyalty is divided loyalty and their lack of effective affiliation at either a horizontal or vertical level renders the union too responsive to the needs of the employer at the expense of the workers.

Recent commentary about Japan suggests that work is long and hard in Japan, that labor mobility is on the rise, and that underneath the veneer of cooperation is a strenuous competition. This is a face of Japanese labor relations seen by some.²⁷

3. *Exporting the Recurring Themes*

What is the proper face of Japanese labor relations? Like most societies it has many faces and raises the universal truth in comparative labor relations, that one must be quite cautious in too-easily transplanting doctrines from one society to another.

However, there are, of course, many positive aspects of Japanese labor relations that are being brought to the United States by Japanese companies investing and setting up operations in the United States. Also, some of the Japanese-style approaches are being adopted and adapted by U.S. companies. There are several recurring industrial relations themes that find increased use in the United States. These include joint employer-employee consultation committees, increased use of flexible job descriptions, and attempts at cooperation rather than conflict to resolve disputes.²⁸

Perhaps most importantly, what the Japanese companies bring with them are their attitudes and expectations regarding personnel and management practices which are based on their own experiences. These can be reflected in management decisions or personnel practices relating to unionism, employment discrimination and dismissals, even though "American managers are running

27. See Modic, *supra* note 25.

28. See, e.g., *Witnesses Tout Benefits of Cooperation Before Presidential Committee on Mediation*, 182 D.L.R. (BNA), A-8 - A-11 (Sept. 19, 1986); see also Note, *The G.M.-Toyota Joint Venture: Legal Cooperation or Illegal Combination in the World Automobile Industry?* 19 TEX. INT'L L.J. 699 (1984).

the company." This potential for bringing Japanese labor relations practices or attitudes to the United States is enhanced by the common use of "rotating staff" whereby Japanese executives and managers rotate from the parent company in Japan to the United States for a two or three-year overseas tour of duty.

B. U.S. Adaptations: Quest to Utilize Essential Elements of Japanese Practices

Japanese are very pragmatic investors in that they usually seek to adapt to their host countries' laws and culture to the extent possible, that will still permit successful operation of their company. Though they may continue to prefer "sushi" they will participate in backyard barbecues; likewise though they may prefer not to have unions, if unions are lawfully established, they will deal with them.²⁹ However, some of their practices such as cooperation with employees and unions raise legal questions under U.S. law.

The Japanese have come to embrace certain American customs such as dismissing employees (though not as readily as U.S. employers); however, they have not yet adjusted to the large jury verdicts in wrongful discharge cases in the United States.

Normally, Japanese companies do not explicitly discriminate against U.S. workers on the basis of race or sex, but rather some of their policies — which are deemed essential to the successful operation of their U.S. subsidiary — have the effect of excluding persons in apparent violation of U.S. law.

American companies seeking to find methods of improving operations have looked to the success of Japanese management and labor relations styles and have sought to implement them. For example, the G.M.-Toyota joint venture in California, and the G.M. Saturn project as well as numerous projects in the steel and manufacturing industries have taken great strides in devising management and labor relations approaches and contract provisions which seek to replace confrontation with cooperation.³⁰ Here too, legal issues are arising as to the extent employers, employees, and unions may cooperate under U.S. labor laws before a violation occurs. All these issues will be discussed below more fully.

29. It is estimated that about 25 percent of Japanese owned companies in the United States are unionized. See *Where the Jobs Are*, *supra* note 2, at 44.

30. A copy of the agreement is reprinted in 107 D.L.R. (BNA) E-1, E-6 (June 4, 1986).

C. Policy Issues Emerging From Legal Agenda

As legal issues arise regarding the introduction of Japanese-style labor relations into the United States and the courts begin the process of applying U.S. labor laws, there is also being generated from the legal agenda, larger policy issues as to how these new labor relations practices are affecting or may affect U.S. labor policies relating to traditional U.S. approaches to unionism, civil rights, and the institutionalized use of confrontation or confrontational-based cooperation to resolve employer-employee differences. Some of these issues are outlined below.

On the issue of what level of cooperation should be permitted between labor and management, several related policy questions arise:

Does the U.S. ability to compete effectively in the international market require changes in U.S. labor policies, permitting greater cooperation? For example, is the National Labor Relations Act violated when employees with quasi-supervisory or managerial responsibilities work with other employees in a shared responsibility situation; or when a group of employees is dealt with by the employer on a broad range of economic and management subjects under a joint consultation arrangement; or in the spirit of cooperation, recognition is given to a union at a new facility before it is opened; or the employer provides training and instructional trips to union officials to learn more about the business? There is case law developing on each of these issues.

Related subsidiary questions include:

a. Can and should American traditions of mandatory roles of confrontation and arms-length dealing be adjusted within the present legal framework of U.S. labor laws to permit increased cooperation without violating the laws or are legislative changes required?

b. Is it desirable to permit too close a relationship; is there not a danger that too much union cooperation with the employer can *co-opt* the union and remove the union as a protective representative of the workers and perhaps at least compromise the union's legal duty of fair representation?

c. Will shared authority between the employers and unions improve worker productivity and increase international competitiveness?

d. Related non-policy practical questions include, whether unions' internal leadership and employers' management leadership can adjust so as to implement changes permitting increased

cooperation?

On these policy issues, Steven Schlossberg, Deputy Undersecretary of Labor, who has coordinated a national study exploring ways to improve cooperation, predicts:

For the last 50 years, the law has assumed that labor and management are adversarial opponents and must have an arms-length relationship. If we're going to be competitive in the global economy, we may have to blur distinctions between labor and management.³¹

A second set of policy issues arise in the area of civil rights legislation affecting labor:

Is present direct investment by foreign companies accompanied by increased incidents of racism or sexism; by foreign companies against American citizens; by American companies against Asian-American citizens?

Related subsidiary questions include:

a. Are U.S. labor laws (e.g., Title Seven of the Civil Rights Act of 1964 and the Civil Rights Act of 1866 (Sec. 1981)) adequate to address any resulting discrimination?

b. Should U.S. labor laws accommodate discriminatory foreign labor practices rooted in traditions argued to be necessary to the successful operation of the business?

On this last point, the U.S. Supreme Court did not yet decide the issue, but has noted that it may be that U.S. labor laws could be interpreted so as to accommodate foreign labor policies. In dictum it stated:

There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs and business practices of that country.³²

The policy question is where the proper balance should be between American social values prohibiting discrimination and the interests of foreign enterprises to maintain adequate control over their choice of personnel permitted under U.S. labor laws. To permit discretion perhaps assists foreign direct investment in the United States but alternatively, it can undermine national labor policies against discrimination.

31. Quoted in Hoerr, *America's Labor Laws Weren't Written For A Global Economy*, Bus. Wk., Jan. 13, 1986, at 38.

32. *Sumitomo Shoji America Inc. v. Avagliano*, 457 U.S. 176, 189 n.19 (1982).

III. LEGAL ISSUES UNDER U.S. LABOR LAWS

A. *Applicability of FCN Treaty*

In 1982 in *Sumitomo Shoji America, Inc. v. Avagliano*,³³ the U.S. Supreme Court held that a Japanese subsidiary *incorporated in the United States* was subject to U.S. labor laws and the treaty defense that permits foreign companies the right to employ executive personnel "of their choice" thus was not available. The decision did not apply to *branches* of foreign companies or foreign companies operating in the United States and the court rejected the notion that its use of the "place of incorporation" test would create a "crazy-guilt pattern" which would give the rights of branches of Japanese companies operating in the United States greatly superior rights over those locally incorporated. The only advantage is the limited right to choose Japanese nationals for certain executive managerial positions.

This "right to choose managers," available to foreign companies and foreign branches, was recently upheld in *MacNamara v. Korean Air Lines*,³⁴ where the federal district court found the FCN treaty immunized the employer from U.S. labor laws when it replaced an American sales manager with a younger Korean employee. Interestingly, it provided a somewhat broad definition of "executive personnel" to include those foreigners approved by U.S. Immigration and Naturalization Service (INS) for treaty trader visas.

Though other recent cases have applied U.S. labor laws, such as the NLRA, to *foreign* companies, this should not be confused with exempting narrow categories of executive personnel from its application, if the issue had arisen in those cases which it did not. For example, the Seventh Circuit recently found the State Bank of India subject to the NLRA in upholding NLRB findings of unfair labor practices against "employees."³⁵ Thus, the definition of "employee" versus "executive personnel" will be important, as one category of the employer's workforce may be covered under the labor law and the other excluded, and this may vary under different labor laws. It is clear that a future issue under cases involving *foreign* companies will be to determine the definition of "executive" under the FCN treaty. A troubling aspect of the recent *KAL* case

33. *Id.*

34. *MacNamara v. Korean Air Lines*, Lab. Rel. Rep. (BNA) (45 Fair Empl. Prac. Cas.) 384 (Nov. 9, 1987).

35. *State Bank of India v. N.L.R.B.*, 808 F.2d 526 (1986).

was the potential for the court to rely too heavily on statutory definitions of various labor laws in reaching its interpretation under the FCN treaty rather than first determining the executive status of the person in question before ever considering the labor law definitions.

Once determining that an FCN defense is available, it is important to note that while the exclusion is broad, the reach of that exemption is narrowly limited to the "executive personnel."

In the *KAL* case, the court stated:

It does not matter that plaintiff's employment discrimination claim is based upon age, race and national origin, and not upon citizenship. The FCN Treaty gives protection to the Korean corporation to make its employment decision in limited areas without regard to domestic employment laws. . . [t]o allow plaintiff to proceed would negate the "of their choice" FCN Treaty language and require the treaty party to justify on a business necessity basis the action taken undermining the treaty commitment to permit treaty parties to control and manage the business enterprise in the host country.³⁶

One of the common practices of Japanese companies investing in the United States is the use of rotating staff who come from the parent company and serve as managers in the overseas assignment for a number of years before they are rotated to another location. Such "executive personnel" are exempted by the FCN treaty from U.S. labor laws only if they are working for a "foreign company;" whereas, if they are working for a foreign company which is *incorporated* in the United States, then under *Sumitomo*, they are not exempt and they are covered by U.S. labor laws.

Some legal issues arise as to who is the "employer" of the rotating staff in such situations; and, if there are joint employers under U.S. law, what is the potential liability, if any, of the Japanese parent corporation? On a related issue, because of the Japanese-style of management, there may be a close, "parent-child" relationship between parent and subsidiary that could bring issues of the legal liability of the parent to the forefront, by the parent company taking active involvement in coordinating the labor and management policies of its subsidiary. These are interesting questions and are of growing concern to international corporation lawyers.

36. Korean Air Lines, 45 Fair Empl. Prac. Cas. at 390.

B. National Labor Relations Act

Under the National Labor Relations Act, the Japanese-style new labor relations, embodying increased cooperation between labor and management, raises legal issues both as to the permissible extent of cooperation and the changing responsibilities and liabilities of the unions under their duty of fair representation. Japanese-style cooperation utilizes joint participation in decision-making, open sharing of information, and increased joint responsibilities over managerial operations. The relationship often is viewed as part of a common enterprise with the "team" all working together to achieve the mutual goal of increasing productivity, and with it, market shares and profitability. Implementing this relationship in the United States has raised several specific legal issues which tests the elasticity of U.S. labor laws.

The use of quality circles, joint consultation committees, and "work teams" which perform some supervisory/managerial functions raise issues under U.S. labor laws, whether workers involved in these cooperative undertakings are "managerial or supervisory" and thus are excluded from the protection of the N.L.R.A.; and/or whether their involvement so taints the arms-length requirement of the U.S. labor-management relationship that it interferes with the employees' right to have their labor organization representative independent of undue employer influence. Does U.S. labor law permit this cooperation or does it require arms-length negotiation through confrontation? The answer has significant ramifications not only for Japanese companies in the U.S. but also the new labor relations arrangements made under Saturn, NUMMI, Pontiac Fiero, and other American ventures.

One of the leading U.S. Supreme Court cases on this issue is *N.L.R.B. v. Yeshiva*,³⁷ where the court found faculty members at a private university participated so directly and effectively in managerial decisions that they lost their "employee" status, and their protection under the NLRA. Though later cases distinguish *Yeshiva*, often on their facts and the extent of real control and influence, the legal dilemma is raised whether employee groups and joint consultation committees can be given so much authority in management decisions and over operations that their influence could be characterized as "meaningful." It would seem that to give employees meaningful input may at the same time make them part

37. *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980).

of the "management team" and strip them of their protections under the labor law. To provide employees with less than meaningful influence risks making a mockery of the entire cooperation mechanism in question.

A 1987 case decided by the NLRB, *Anamag*,³⁸ addressed this issue where the employer was utilizing the Japanese "team concept" of managerial philosophy. In that case, the employer established, for the stated purpose of promoting "employee participation in decision making and to foster open communication between management and employee," a number of teams each led by a "team leader." The team had some authority over personnel matters such as discipline, performance evaluations, job assignments, overtime, and grievances.

The narrow legal issue before the Board was whether the team leader had been given sufficient authority over work assignments, discipline, and benefits to render him a "supervisor" under the Act. The Board found that although the "teams" performed some supervisory functions, the team leader, in this case, was determined not to be a supervisor. The Board found it important that the team leader was elected by the team and served solely at the will of the team. Also the team leader functioned primarily as a spokesperson for the team rather than on behalf of management and any nominal authority possessed by the leader was possessed only by the continuing tacit agreement of the team.

The Board in approving this arrangement seems to suggest that if "employee teams" are performing management functions and as a group retain the right to remove themselves or their team leader from that role, the law will seek to accommodate that desire. The Board in declining to exclude the team leader from the bargaining unit, noted that the "novel and rather complex conceptual framework within which team leaders perform their functions" was a "framework which surely was not contemplated by the drafters of the Act over 50 years ago."³⁹ Thus, the Japanese style use of worker teams with "non-supervisory" team leaders may in some forms be accomplished under existing U.S. labor laws. The significant factor in the *Anamag* case seemed to have been the retained right of employees to withdraw cooperation and to confront if necessary.

However, it is difficult to generalize on these issues due to the

38. *Anamag*, 284 N.L.R.B. 72 (1987), 125 L.R.R.M. 1287 (1987).

39. *Id.*

myriad of variables in such personnel arrangements and the resulting legal issues. For example, if actual managerial or supervisory personnel are closely working with the teams, perhaps in a commonly used joint consultation relationship, this could change the decision and render the cooperation unlawful as interfering with employees' free choice or dominating a "labor organization." Case law on these types of issues are arising; and, although traditional case law might find particular labor-management joint consultation committees to be a "labor organization," some courts are holding these groups should not be set aside as unlawfully dominated absent a finding of "actual" rather than "potential" domination. The Ninth Circuit Court of Appeals on this point noted:

[f]or us to condemn this organization would mark approval of a purely adversarial model of labor relations. Where a *cooperative* arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act.⁴⁰

What these joint cooperative committees discuss can also raise legal issues in a collective bargaining relationship if the committee is not also the union. Japanese employers are used to open communication on many issues — mandatory and non-mandatory — and under Japanese labor law they are obligated to discuss these matters with all unions, *majority* and *minority*. Thus, if Japanese employees follow that practice in the United States, issues can arise about who the employer is "dealing" with and about what.

Another recent legal development arising out of the relationship of cooperation, is the *pre-recognition* issue of the *General Motors, Saturn Corp.* case.⁴¹ In this case, the employer and union under an existing relationship, in contemplation of the opening of a new business operation entered into an understanding that the union would represent the workers at the new facility. The move was challenged as a premature recognition and as unfairly interfering with the new employees' right to choose their own union representative and as unfairly assisting the recognized labor union. The Board, after considerable deliberation, found that the agreement reached by G.M. and the U.A.W. did not violate the Act in that

40. *Hertzka & Knowles v. N.L.R.B.*, 503 F.2d 625, 631 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975) (emphasis added).

41. 13 Advice Mem. Rptr. Para. 23,090 (1986); *see also* 107 D.L.R. (BNA) A-4 (June 4, 1986).

recognition was to be given only if the union established majority status at the new plant.

The attempt to cooperate by pre-recognition agreements, while in some situations, not an improper subject to discuss, must be approached cautiously in that U.S. labor law is clearly settled in favor of first requiring majority consent to a bargaining representative.

Other issues that may arise from Japanese companies using Japanese-style labor relations in the companies' treatment of the unions and union officials. In Japan, close working relationships with union officials may include payments to them for a number of labor relations related activities. In the United States, such assistance is limited by the labor laws and thus a number of practices in the United States such as flying union officials to Japan to study Japanese labor relations, as well as other concerns, must be examined carefully.

The final issue is perplexing to American unions; how do the unions respond to the movement into the new cooperative labor relations? In addition to the internal political realities facing union leadership, and the concerns of being undercut and rendered impotent by this new approach, legal issues can also arise from the unions' changing role, as regards its duty of fair representation.

While cooperation is certainly not a new word to American unions, their embrace of the new challenges of joint consultation, company teams, etc., has been deliberative. To move from a role primarily protective of workers' interests into one which also participates in work strategies to increase productivity, of course raises many issues for union leaders, many of which are non-legal, policy issues. To the extent meaningful decisions are made which are perceived detrimental to the workers' interests, members can raise the issue of unfair representation by their union. At least in this respect, the employer shares the union's desire to fairly represent the employees, as that provides the employer a defense in Section 301 breach of contract suits. Therefore, as always, it is in the interest of employers, unions, and employees to find that right balance of cooperation which is permitted under the labor laws and meets the needs of the parties as best as can be accommodated.

C. Employment Discrimination

Japanese employers in the United States are experiencing some legal problems with employment discrimination claims, per-

haps arising from their adherence to industrial relations practices brought from Japan. These practices often require great selectivity in hiring, treatment of individual employees as members of groups within the company for benefits and incentives, and retention of the "home office rotating staff of managerial employees system" and employment practices arising from its use.

Japanese employers in Japan and in the United States always are very selective in their hiring practices. This, it is felt, will minimize later personnel problems and work toward the goal of having a "harmonious family operation." Attitude, as well as skill, is seen as a useful ingredient in this "recipe" for success since loyalty, ability to work in a group, and accepting flexible job assignments is part of the Japanese managerial philosophy. Reports indicate that Nissan Motor Company in Tennessee hired 2,000 employees from a pool of 130,000 applicants after rounds of tests and interviews.⁴²

With the use of high selectivity and subjective factors such as attitude, lawsuits under U.S. employment discrimination laws can be anticipated and there have been a number of cases in the United States in recent years against Japanese companies including Sumitomo, Honda, Toshiba, Hoya, Cannon, and NEC Electronics.⁴³ There is no indication of an abnormally high number of cases involving foreign companies, but likely because of the real and perceived effects of the U.S. trade deficit and increased direct investment in the United States, such cases are widely reported.

One such case involved Honda Manufacturing Co., Inc. which recently agreed to a \$6 million out-of-court settlement with the E.E.O.C. on race and sex discrimination charges where 370 blacks and females were awarded back pay and seniority for having been denied jobs at Honda.⁴⁴ This followed a prior E.E.O.C.-Honda settlement last year for nearly \$500,000 involving age discrimination charges.

Foreign companies traditionally send a nucleus of key personnel to the United States to establish and maintain operations. These often consist of the rotating staff of executives and managerial employees who typically enter the United States under a treaty trader visa, as discussed earlier. These rotating staff personnel are usually male Japanese nationals. The percentage of home country staff varies with the type of operation. For example, in the

42. Junkerman, *Nissan, Tennessee*, THE PROGRESSIVE 16, 17 (June 1987).

43. *Id.*

44. See 58 D.L.R. (BNA) A-9 (Mar. 25, 1988).

late 1970's Sumitomo Shoji America, Inc. employed about 432 people nationwide and over 200 people in its New York offices.⁴⁵ About 40-45 percent of the New York employees were rotating staff. By contrast, Nissan Motor Co. in Tennessee had 13 Japanese executives at a facility which employs 3,300. These positions held by the foreign executives, however, are extremely influential.

In 1982, the U.S. Supreme Court in *Sumitomo Shoji America, Inc.*,⁴⁶ held that Japanese companies incorporated in the United States are subject to U.S. labor laws. In that employment discrimination case, no application of U.S. labor laws was made, but the case was remanded. In dictum, though no decision was made, it was stated that Title Seven of the Civil Rights Act of 1964 may or may not accommodate Japanese labor and managerial employment practices. Some five years later, a settlement in this case was announced where the employer agreed to allocate nearly \$3 million over three years to train, promote, and pay its female workers in the United States.⁴⁷ The settlement agreement also requires that women be placed in 23-25 percent of the management and sales positions. The company attorney is quoted as saying there is no admission of liability and the agreement reflects a decision to "Americanize" its U.S. offices as part of a "world-wide localization" of its subsidiaries.⁴⁸

Whether this "Americanization" process will be picked up by other Japanese companies and will involve integration of rotating staffs remains to be seen. It is predictable, however, that the lawsuits will continue.

Employment practices by Japanese companies which may give rise to legal issues often emanate from the rotating staff policy and distinctions made between foreign nationals and U.S. citizens working for the same company. For example, besides the obvious hiring and promotion problems of such a policy where the staff is usually all male Japanese nationals, other issues involve disparate benefits paid or provided to them in terms of salaries, incentives, travel, training, and layoff protection.

One case involving *Shiseido Cosmetics America, Ltd.*,⁴⁹ in-

45. *Avagliano v. Sumitomo Shoji America, Inc.*, 103 F.R.D. 562, 568-569 n. 7 (S.D. N.Y. 1984). (For Nissan statistics, see *Where The Jobs Are*, *supra* note 2.

46. *Sumitomo*, 457 U.S. at 176 (1982).

47. See 10 D.L.R. (BNA) A-7, A-8 (Jan. 15, 1987).

48. *Id.* at A-8.

49. *Shiseido Cosmetics (America) Ltd. v. State Human Rights Appeal Board*, 72 A.D.2d 711, 421 N.Y.S.2d 589 (1979).

volved a dismissal of a U.S. citizen, a female, under a retrenchment policy that left the Japanese rotating staff in tact. The New York court held there was no evidence of national origin discrimination and noted "the Japanese were in reality employees of the parent corporation" assigned under a rotation program, thus showing a legitimate business reason. It is doubtful that this 1979 lower court case provides a very substantial precedent where evidence is shown of racial or sexual discrimination or even where evidence is shown of disparate impact, absent a proper legal defense.

The primary laws prohibiting employment discrimination are Title Seven of the Civil Rights Act of 1964 and the 1866 Civil Rights Act (Section 1981).⁵⁰ Title Seven prohibits discrimination based on race, color, religion, sex, or national origin and Section 1981 prohibits discrimination based on race.

The potential violation by a Japanese company is the same as exists for U.S. companies, but the employment of Japanese male nationals in the rotating staff adds an additional level of potential liability based on race, sex, and national origin. Under Title Seven, discrimination based on citizenship has been equated in pertinent cases with national origin and held by the U.S. Supreme Court to be excluded from coverage under the Act (unless it can be shown to be pretextual).⁵¹ On the other hand, the U.S. Supreme Court in 1987 in *Saint Francis College v. Al-Khazraji*⁵² and *Shaare Tefila Congregation v. Cobb*⁵³ held that under the 1866 Civil Rights Act, "race" may embody concepts of national origin and ethnicity (and perhaps therefore, *albeit* indirectly, citizenship) so that discrimination on that basis is unlawful. Furthermore, the 1866 Civil Rights Act provides for punitive damages.

Under U.S. law, even where violations may be shown certain defenses may immunize the discriminating employer. For example, under Title Seven an employer who can show its discrimination was based on "business necessity" or a "bona fide occupational qualification" may be excused. The Supreme Court in *Sumitomo* did not rule on these defenses, but observed:

There can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the

50. Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1982); Civil Rights Act of 1866, 42 U.S.C. §1981 (1982).

51. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

52. *Saint Francis College v. Al Khazraji*, 107 S. Ct. 2022 (1987).

53. *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987).

culture, customs and business practices of that country.⁵⁴

Whether that will be interpreted by the courts to permit the statutory defenses remains to be seen. There are many obstacles to that conclusion as important questions of fact and policy are raised; such as — cannot an American who speaks Japanese be hired; and, should foreign companies' employment practices be used to justify discriminatory policies which otherwise violate U.S. labor laws? The cases providing these interpretations should be occurring in the immediate future, unless, as Sumitomo's attorney stated, programs by the Japanese companies to "Americanize" its operations remove the issue, by a change in the employment practice of utilizing only Japanese males in their rotating staff. Ironically, this practice is not peculiar to Japan or to Japanese labor relations, as many foreign companies, including those from the United States, utilize rotating staffs.

Lastly, some mention should be made of the developing case law involving employment discrimination by American companies against Asian-Americans. The significance of this might lie in the ironic development that a body of case law is building in response to discrimination (perhaps precipitated by the successes of foreign companies in trade and investment) against Asian-Americans that will provide useful law for U.S. plaintiffs to combat alleged discrimination by foreign companies.

This "reverse discrimination" claim against foreign employers would be based on developing case law where the American employer is found to violate the law. For example, cases under Title Seven have held unlawful discrimination exists where unequal pay is given based on national origin; where tenure is denied based on ancestry;⁵⁵ and, under Section 1981, where employment decisions are based on being a Chinese-American or a Korean-American (Oriental).⁵⁶ In 1987 the Supreme Court found Italian-Americans were a cognizable racial group under Section 1981.⁵⁷ Inasmuch as the Supreme Court has also held that both Title Seven and Section 1981 provide a remedy for caucasians discriminated against because of race,⁵⁸ a substantial body of legal precedent presently exists to provide a remedy for proven discrimination by a foreign

54. Sumitomo, 457 U.S. at 189 n.19 (1982).

55. See, e.g., *Woo v. Board of Regents of California*, (BNA) (32 Fair Empl. Prac. Cas.) 349 (1983).

56. See, e.g., *Kim v. Commandant Language Institute*, 772 F.2d 521 (1985).

57. *Chirino v. Jordan Marsh Co.*, 107 S. Ct. 2476 (1987).

58. See *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

employer, based on the applicant or employee's ancestry or ethnic characteristics, though it is more difficult when based merely on citizenship.

Though Section 1981 (unlike Title Seven) does not prohibit sex discrimination, court interpretations provide for punitive damages, available to all whose claims of discrimination can be characterized as based on ancestry or ethnic characteristics not based solely on national origin.⁵⁹

D. Wrongful Discharge

Japanese employers in Japan *stereotypically* do not dismiss employees except for severe misfeasance. While this tends to be true in the minority percentage of the workforce where lifetime employment is still used, many Japanese workers, especially the temporary workers, know that severance of employment is not unexpected nor uncommon. However, under Japanese law, where dismissal occurs, remedies may be available where proper notice is not given or sometimes if there is inadequate cause; and although Japanese traditionally loathe resorting to litigation, an increasing number are seeking remedies, which is often dealt with by mediation or conciliation.

The difference between Japan and the United States, however, lies in the remedy. In Japan, an apology still goes a long way toward restoring an injured plaintiff, and when compensation is awarded it is traditionally very modest by U.S. standards. Therefore, when a U.S. based Japanese employer is forced to dismiss an employee, as is the American style, it is usually quite surprised by reports that plaintiffs in wrongful discharge cases in some states prevail nearly three-fourths of the time and often recover in excess of \$400,000.⁶⁰

The number of discharges of employees in the United States by Japanese companies is certainly not widespread, and is likely fewer than that of U.S. employers, because of very selective hiring procedures. However, there are areas of vulnerability for Japanese managers, as where they might react against a "disloyal" employee by considering discharge. Disloyalty of course can be based on many factors, but it also can occur when an employee will not vio-

59. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

60. See Labor and Employment Law Section, State Bar of Cal., *To Strike a New Balance*, LABOR AND EMPLOYMENT LAW NEWS 5 (Feb. 8, 1984), cited in, 8 UNIV. HAW. L. REV. 330 n.361.

late public policy for the employer or when the employee "blows the whistle" on its employer's wrongdoing. Both cases are classic examples of wrongful discharge under U.S. law, where similar cases have provided remedies of millions of dollars. These problems are sometimes aggravated by the tendency of Japanese clients to seek their lawyer's advice after the problem, rather than seeking preventative advice.

For the most part, however, it has been my experience that Japanese clients want to obey the U.S. labor laws and be good citizens. On the other hand, they do not want to be placed on a competitive disadvantage with American competitors, and as they seek profit and market shares, they seek to keep their basic labor and management styles that work so well.

IV. CONCLUSION

All indications are that Japanese and other foreign investment in the United States will continue at an accelerated pace, and increasing numbers of Americans will be working for Japanese-owned companies. Because Japanese management brings with it the familiar faces of Japanese traditions of management and industrial relations approaches and because American companies will continue to adopt the Japanese style of labor relations, it is prudent to conclude the legal issues just described will continue before the U.S. courts.

Policy and legal questions involving the U.S. labor laws need to be addressed by those who are interested. And, perhaps the United States will find itself continuing to move on the course from confrontation toward cooperation, in both attitudes and in employment practices.

However, I would submit that before we completely embrace total cooperation and joint decision-making between labor and management based on the Japanese experience and change our laws to accommodate the new labor relations, that we pause to carefully examine the effects:

- on the protection of workers, in terms of health, economics, and quality of worklife;
- on the structures, strength, and liabilities of American unions;
- on productivity; and
- the advantages and disadvantages on the management of U.S. businesses.

One face of Japanese labor relations with its shiny efficiency,

enterprise unionism, cooperation, and productivity should be placed in proper context with another face of Japanese labor relations which yet seeks to achieve a forty hour work week and a work atmosphere where workers actually take their vacation time. Is America ready for this?

Perhaps Sumitomo's lawyer was correct in predicting the "Americanization" of Japanese companies in the United States will sweep away many of the legal issues under U.S. labor laws; but until that time, it seems only prudent to continue with the approach used by the NLRB and the courts of encouraging voluntary and innovative uses of cooperative mechanisms in the work place while at the same time protecting the rights of the participants, labor and management, to step back if necessary to protect their legitimate interests through confrontational or other means of self-help.

Perhaps this interim approach, a type of conditional cooperation, or — "cooperative confrontation" — with emphasis on the former, can spawn a trust and respect that will provide a basis for development of appropriate national policy approaches to the U.S. labor laws which will meet the needs of international and domestic competition.

In the meantime, on the practical operational level, cooperation and techniques of mutual benefit should be encouraged and the law should be scrutinized to avoid legal preclusion of such experimentation. Flexibility, under the law, should continue to permit the structuring of wedded interests so that if desired an enterprise, composed of management and workers, can operate increasingly as an integrated, productive organism where mutual self-interest propels it into competitive excellence. The challenge then is to draw upon the results of this experimentation a new national labor policy which works most effectively to promote the interests of competitiveness while at the same time protecting the rights of workers and unions.

